

1 carries over, and it states, "The negative and
2 significant coefficient on the interaction
3 between the Comcast indicator and the DBS and
4 teleco share variable shows that in markets
5 with relatively high levels of competition,
6 Comcast reduces the carriage of its own
7 network." That's the Goolsbee analysis we've
8 discussed. Correct?

9 A It's patterned on Goolsbee. Just
10 so we're all clear, and the record is clear,
11 what the FCC did is not precisely Professor
12 Goolsbee's approach, but it is patterned after
13 it.

14 Q It purports to draw on his
15 approach, and apply it in this context.
16 Correct?

17 A I agree with draws upon and
18 utilize it, that's for sure.

19 Q And have you talked to Dr.
20 Goolsbee about whether he agrees with
21 utilizing this approach in this context?

22 A No, but I've read his paper, and

1 he has far more caveats about his analysis
2 than are presented here.

3 Q But you don't know factually
4 whether he agrees or disagrees with applying
5 his approach in this context, do you?

6 A I have not talked to Dr. Goolsbee
7 about this analysis.

8 Q But you disagree with applying his
9 approach in this context. And by this
10 context, I mean evaluating whether carriage
11 decisions show -- are suggestive of
12 discrimination.

13 A I believe it could give false
14 results. I talk about on my direct testimony
15 about my potential problems about the
16 methodological approach, and the lack of
17 instrumental variables that the Commission
18 staff in the appendix failed to use, even
19 though in past cases they have used
20 instrumental variables.

21 Q So, you disagree with their
22 application of the Goolsbee approach in this

1 document?

2 A Well, disagree as a matter of
3 theory in the application.

4 Q And that's what I'm trying to get
5 at. Theoretically, you don't believe the
6 Goolsbee approach applies in this context.
7 Correct?

8 A It's not --

9 Q Yes or no?

10 A Well, I can't answer yes or no.

11 Q Okay. That's fine, and please
12 tell me if you can't.

13 A I can't.

14 Q Okay.

15 JUDGE SIPPEL: I'm seeing this
16 document, paragraph 67?

17 THE WITNESS: No, page 166.

18 JUDGE SIPPEL: Yes, but I'm
19 reading -- I'm away from you.

20 THE WITNESS: Oh.

21 JUDGE SIPPEL: On paragraph 67, if
22 I have the right copy. So, the method

1 developed by Professor Goolsbee in a recent
2 Commission study and adopted by the applicants
3 in this proceeding. What am I supposed to
4 glean from that? What do I learn from that
5 statement?

6 MR. SCHMIDT: Let me ask -- if I
7 could ask some questions about that, Your
8 Honor.

9 JUDGE SIPPEL: Okay, please do.
10 Yes.

11 BY MR. SCHMIDT:

12 Q Do you agree that the Goolsbee
13 methodology has application in the context of
14 considering whether Comcast's carriage of its
15 networks is discriminatory? Yes or no?

16 A I believe it has a place, if
17 implemented properly and modestly so one does
18 not draw wrong inferences. But the way it's
19 used, I have significant issues with.

20 Q Okay. So, would you agree with me
21 that the Goolsbee analysis presents a
22 promising line of inquiry for evaluating

1 whether carriage decisions have been driven by
2 efficiency considerations, not foreclosure
3 incentives? Do you agree with me on that?

4 A I think that is not sufficiently
5 caveated.

6 Q Okay.

7 A And one would have to also insure
8 that one implements the model correctly, and
9 includes, for example, an instrumental
10 variables approach to insure that the issue we
11 talked about, that there is not a potential
12 bias in the regression, because causality goes
13 the opposite direction. So, one would have to
14 correct for that.

15 Q Okay.

16 JUDGE SIPPEL: So, I take it then
17 you -- I don't want to put words in your
18 mouth, but as I'm reading, does that statement
19 say too much when it says it was adopted by
20 the applicants in this proceeding? You seem to
21 be qualifying that quite a bit.

22 THE WITNESS: I mean, I'm not

1 precisely sure. I mean, I'm not precisely
2 sure what they mean by that.

3 JUDGE SIPPEL: It has a subject,
4 verb and -- it's pretty clear to me what it
5 says.

6 THE WITNESS: I mean, I think what
7 they're after here is that the economist
8 working for Comcast on the merger submitted
9 a filing using a different approach than is
10 presented here, but adopting certain of the
11 principles of the Goolsbee approach. So,
12 that's I think why they say "adopted by the
13 applicants in this proceeding." It's by the
14 applicant's economist that that was submitted,
15 that there was a version of this that isn't
16 what the FCC did, but adopts some portions of
17 the Goolsbee model.

18 BY MR. SCHMIDT:

19 Q And that was my question.
20 Comcast's own economist adopted a version of
21 the Goolsbee model in connection with
22 Comcast's merger application. Correct?

1 A I believe that to be true, and
2 they did it in a different way, in a far more
3 appropriate way.

4 Q Well, did you have any involvement
5 in doing that?

6 A No, I did not, but I have reviewed
7 their filings.

8 Q Have you gone out and replicated
9 their work?

10 A In some sense in doing the work to
11 respond to Dr. Singer, I looked at a lot of
12 the record evidence, including those filings.
13 And my analysis more closely parallels that
14 than the FCC analysis in the sense that I also
15 try instrumental variables. They don't do
16 that here.

17 Q My question is, did you replicate
18 the Comcast economist's work that they
19 submitted to the FCC? Have you done that
20 personally?

21 A No, I have not replicated that.

22 Q Thank you. Have you -- when you

1 did your analysis, did you come out with the
2 exact same result as the Comcast economists
3 did in your application of the Goolsbee model?

4 A No, because they have never looked
5 at, as best as I know, and none of the
6 submissions that I saw, they never looked at
7 Golf and Versus, or the Tennis Channel
8 individually, and that's what I was looking
9 at, because that's what's relevant for this
10 case. And if we note, in this document they
11 talk about how this doesn't apply to any
12 individual channel, so that's what I'm trying
13 to do, is extend what has been done here with
14 the caveats about the shortcomings of this
15 approach, and apply it to individual channels.
16 And I find conclusions that suggest that the
17 decisions to carry their programming are not
18 due to anti-competitive -- for anti-
19 competitive reasons.

20 Q Do you know who the Comcast
21 economists were who worked on the Goolsbee - -
22 who performed, applied the Goolsbee method in

1 connection with the Comcast merger?

2 A Well, they had a large number of
3 economists working on it. I believe the
4 economists that submitted this were Michael
5 Katz, who is a professor at the University of
6 California at Berkeley, and a colleague of
7 mine, and Mark Israel.

8 Q The two economists who submitted
9 this to the FCC were colleagues of yours at
10 your company. Correct?

11 A They are colleagues of mine in my
12 company. That doesn't mean I agree with
13 everything they write.

14 Q Did you put Comcast in touch with
15 them in connection with the merger matter?

16 A Comcast doesn't -- Michael Katz
17 was the chief economist of the FCC. And
18 Comcast is well aware of Michael, they didn't
19 need to call me to get to Michael.

20 Q Did you play any role in that
21 retention?

22 A I think the only role I played was

1 I signed the retention agreement as the
2 managing partner of the firm.

3 Q Okay.

4 A I did not bill a single hour on
5 the matter.

6 Q But you don't agree with
7 everything that Professor Katz and Professor
8 Israel did in their application of the
9 Goolsbee analysis. Correct?

10 A No. In fact, some of their
11 analyses contradict previous analyses I've
12 done adverse to Comcast, so it's -- I mean, as
13 an economist, I don't agree with all of my
14 partners all the time. And, in this case, I
15 don't agree with everything they did.

16 Q Okay. In fact, don't you agree
17 with me that the Goolsbee model is an
18 unreliable tool for assessing allegations of
19 discriminatory carriage?

20 A I am --

21 Q Do you agree, yes or no? Do you
22 agree with that statement, sir?

1 A I --

2 Q Can you answer yes or no?

3 A Without implementing it correctly,
4 and without caveats --

5 Q Yes or no, sir?

6 MR. SCHMIDT: Your Honor, I would
7 ask that the witness be instructed to answer
8 yes or no. I've tried to frame my questions as
9 yes or no questions. I've given him the
10 opportunity, if he'd like, to let me know he
11 cannot answer yes or no. I think this is a
12 pretty simple question.

13 MR. CARROLL: Your Honor, I would
14 say he's been equally, at least, as responsive
15 as their expert was on examination. And I
16 don't think that's an appropriate --

17 JUDGE SIPPEL: Well, that's a
18 tough one. I understand what you're trying to
19 do and move it along, but perhaps it can't --
20 well, I don't -- can you answer that question
21 yes or no, and then qualify it?

22 THE WITNESS: I would say that's

1 closer to being a true statement, but I would
2 want to have lots of caveats around it. I
3 mean, the answer is I am deeply concerned
4 about the reliability of the analysis if
5 conducted incorrectly.

6 BY MR. SCHMIDT:

7 Q Okay. Well, let me just make sure
8 I have your answer, because it kind of got
9 lost there.

10 JUDGE SIPPEL: You know what I've
11 learned out of this so far? That economists
12 charge by the hour.

13 (Laughter.)

14 BY MR. SCHMIDT:

15 Q Can you agree with me, yes or no,
16 with the following statement, the Goolsbee
17 model is an unreliable tool for assessing
18 allegations of discriminatory carriage?

19 A I will agree to that if
20 implemented inappropriately, and I would want
21 to have some caveats about this. It is -- I
22 agree with that statement more, and I would

1 put caveats about the reasons why, and then
2 the question is, could you fix it?

3 Q Okay. Let's look at paragraph 68
4 of your report, of your direct testimony,
5 Comcast Exhibit 80 on page 56.

6 JUDGE SIPPEL: Page 56?

7 MR. SCHMIDT: Yes, sir. Page 56,
8 the carryover paragraph number 68.

9 JUDGE SIPPEL: That's one -- well,
10 am I on 13? Am I supposed to be on 13?

11 MR. SCHMIDT: No, I'm sorry. It's
12 the direct testimony, Exhibit 80.

13 JUDGE SIPPEL: Oh, I'm sorry.
14 Okay. I have it.

15 MR. SCHMIDT: Mr. Orszag's direct
16 testimony.

17 JUDGE SIPPEL: I have it. Give me
18 that page again.

19 MR. SCHMIDT: Page 56.

20 JUDGE SIPPEL: Got it.

21 BY MR. SCHMIDT:

22 Q And I'm looking at the first full

1 sentence on this page, which is what I've been
2 quoting. "For these and other reasons, the
3 Goolsbee model is an unreliable tool for
4 assessing allegations of discriminatory
5 carriage." Did I read that correctly, yes or
6 no?

7 A And in the previous times you were
8 dropping "for these and other reasons," which
9 was what I was trying to qualify.

10 Q Okay. Do you provide in this
11 document a way to fix the Goolsbee model and
12 make it a reliable tool for assessing
13 allegations of discriminatory carriage?

14 A Well, I talk about the problems
15 with it, and that's a straightforward
16 econometric way to potentially address it.
17 But I don't discuss the instrumental variables
18 approach here directly, but I did discuss it
19 at length for pages in my deposition, because
20 this was a topic then, as well.

21 Q You didn't say how to fix it in
22 your deposition, and you didn't say how to fix

1 it in your direct testimony. Correct?

2 A I absolutely said how to fix it in
3 my deposition.

4 Q Did you say it in your direct
5 testimony, sir?

6 A I didn't need to. I wasn't
7 presenting my own analysis of it. I was
8 showing the problems with it, not the fixes to
9 it.

10 Q And you would not sponsor before
11 the Court an unreliable tool for assessing
12 allegations of discriminatory carriage, would
13 you?

14 A Not without trying to fix them,
15 and that's why I had all the caveats around my
16 presentation of my response to Dr. Singer,
17 because I think I said right at the beginning,
18 putting aside my methodological issues and my
19 problems with this approach, I'm staying
20 within that framework and the FCC framework.

21 Q Well, you said in your direct
22 testimony, if I got it right, you said you

1 disagree with the Goolsbee method. It's flawed
2 from an economic point of view. Do you stand
3 behind that?

4 A Without making appropriate fixes,
5 yes.

6 Q Have you fixed it?

7 A I have attempted to fix it with an
8 instrumental variables approach.

9 Q Have you achieved that goal, sir?

10 A I have -- I'm not endorsing this
11 approach, because the instruments aren't
12 working well.

13 Q Even with your approach, your view
14 is it's still not a reliable methodology for
15 assessing discrimination. Correct?

16 A There are other potential
17 explanations that would need to be considered,
18 so Dr. Goolsbee in his own report has those
19 caveats.

20 Q And that's my question, you have
21 not done the work to turn this into a fully
22 reliable method for you to assess

1 discrimination, have you?

2 A That's why I did not present it
3 myself.

4 Q Thank you.

5 A In my direct testimony, just so
6 it's clear.

7 JUDGE SIPPEL: Are we still in
8 closed session, or can this gentleman be told-

9 MR. SCHMIDT: I can't tell you
10 where we are right now, Your Honor.

11 MR. TOSCANO: Well, the door is --
12 - do you want me to go see if he's out there?

13 JUDGE SIPPEL: If you don't mind.

14 MR. SCHMIDT: I did want to raise
15 the question of at what point we should take
16 a break, Your Honor. I'm fine continuing, I'm
17 fine breaking.

18 THE WITNESS: Can we take a break?

19 MR. SCHMIDT: I'd be happy to take
20 a break for Mr. Orszag.

21 JUDGE SIPPEL: Okay. Mr. Orszag
22 carries the day.

1 MR. TOSCANO: Your Honor, I just
2 summoned his back. We're taking a break.

3 (Laughter.)
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1 JUDGE SIPPEL: I've got to say 25
2 after. It's 10 after now, 25 after. Okay?

3 MR. SCHMIDT: And, Your Honor,
4 obviously same rule that the witness won't
5 confer with counsel during the breaks, please.

6 JUDGE SIPPEL: Yes. You
7 understand that, Mr. Orszag.

8 THE WITNESS: Yes, I do.

9 JUDGE SIPPEL: Okay. We're in
10 recess. Thank you.

11 (Whereupon, the proceedings went
12 off the record at 4:06 p.m., and went back on
13 the record at 4:27 p.m.)

14 JUDGE SIPPEL: Okay, Mr. Schmidt.
15 You may proceed.

16 BY MR. SCHMIDT:

17 Q Let me see if I can round out my
18 questions on the FCC merger documents, subject
19 to being able to reexplore them in a
20 deposition.

21 So to round them out, you have not
22 gotten the analysis to the point where you're

1 comfortable using it as a reliable method to
2 evaluate discriminatory conduct by Comcast,
3 whether it exists or doesn't exist; correct?

4 A I have not produced a result. I
5 believe this framework isn't the ideal
6 framework for analyzing this question. If
7 that is the statement, that is true.

8 Q So you disagree with Dr. Singer on
9 that?

10 A I disagree with Dr. Singer on
11 that.

12 Q You disagree with the FCC on that?

13 A I disagree with the FCC staff on
14 that, yes.

15 Q You disagree with your partners on
16 that?

17 A Well, remember --

18 Q Yes or no.

19 A If you get a reliable way to do
20 it, and which might -- in their analysis, they
21 have gotten more stable results that they
22 presented. So that is a more reliable

1 approach, and so what they have done, I don't
2 have as significant issues with as what others
3 have done.

4 Either the simple averages, which
5 isn't what the FCC did, what Dr. Singer did,
6 or the FCC approach, which they don't include
7 instrumental variables.

8 Q You have issues with the analysis
9 your partners have done?

10 A I still have some degree of
11 concern with that, yes.

12 Q So you're not comfortable with the
13 way they've done it either fully; correct?

14 A I think it's fair to say I'm not
15 fully comfortable with it, that is correct.

16 Q And just so we have it, because
17 you said it was the staff at the FCC, the
18 document I have given you includes the actual
19 Memorandum Opinion and Order of the full FCC.
20 Do you have that as well in the first portion?

21 A Yes, I do.

22 Q Let's look at page 48 of Exhibit

1 13, Tennis Channel Exhibit 13.

2 A Page 48 you said?

3 Q Yes.

4 A Okay, thank you very much.

5 MR. SCHMIDT: Do you have that
6 one, Your Honor? It's Tennis Channel Exhibit
7 13.

8 JUDGE SIPPEL: Tennis 13. Yes,
9 that's the -- I'm sorry. That's the merger?

10 MR. SCHMIDT: Yes.

11 JUDGE SIPPEL: I have that, yes.

12 BY MR. SCHMIDT:

13 Q Do you see page 48, paragraph 117?
14 And so I had it. This is the actual opinion
15 of the FCC; correct?

16 A I believe. I'm not expert in all
17 the precision, but I believe that to be the
18 case, yes. There's a legal issue about what
19 is what.

20 Q They state in the text these
21 conclusions are supported by the evidence set
22 forth in the Technical Appendix. That's the

1 Technical Appendix we've been discussing;
2 correct?

3 A That is correct.

4 Q That "Comcast may have in the past
5 discriminated in program access and carriage,
6 in favor of affiliated networks for anti-
7 competitive reasons." Did I read that
8 correctly?

9 A And I think for completeness --

10 Q Did I read that correctly?

11 A Yes. You should include the
12 footnote.

13 Q And that's the analysis we've been
14 talking about; correct?

15 A Yes. You left off the footnote,
16 just so the record's clear.

17 Q Is that the analysis we've been
18 talking about, Mr. Orszag?

19 A Yes.

20 Q And the footnote says "We do not
21 reach any conclusion as to whether Comcast has
22 discriminated against any particular

1 unaffiliated network in the past; correct?

2 A That is correct.

3 Q That's because they didn't analyze
4 particular unaffiliated networks as far as we
5 know?

6 A That is correct.

7 Q Is that statement about past
8 discrimination, in this context -- in other
9 words, the language that's just been quoted,
10 is that discrimination? Is that -- do you see
11 that as being a legal conclusion or an
12 economic conclusion?

13 A As an economist, I believe it's a
14 legal opinion here, because it's stated by the
15 Commissioners, who are not economists. The
16 Technical Appendix, I'm not even sure who
17 within the Commission authored it, whether --
18 which team it was, so I can't ascertain. So
19 I believe this is a statement by the legal
20 team right here.

21 Q This one? Well, this one sentence
22 with the footnote in the reference is only as

1 good as what it refers to. So I'm not asking
2 you about the statement itself. I'm saying
3 that what it's referring to is past
4 discrimination in program access, as analyzed
5 in the appendix.

6 A Right. So that's where in the
7 appendix, they're looking at four channels
8 together. They never look at Golf and Versus
9 on their own.

10 Q Well, I understand, I understand.
11 To the extent that I need to right now, I
12 understand that. But I'm saying is does that
13 strike -- and you don't need to form an
14 opinion on this, but do you consider that to
15 be a, what's in that appendix a legal
16 conclusion or an economic conclusion, whether
17 it's right or wrong?

18 A In the appendix, I would say
19 that's an economic analysis. I would say that
20 this is a legal discussion of it. But that's,
21 I mean, an economist --

22 Q Oh, all right, yes. I understand

1 what you're saying that. Okay. But you do
2 understand them to be relying on the economic
3 analysis in the Technical Appendix; correct?

4 A That is correct.

5 Q Let's look, one more time, at that
6 Technical Appendix, page 167, where they say
7 at the end of paragraph 70, that they have not
8 reached a conclusion about any particular
9 unaffiliated network in any specific case. Do
10 you see where I am?

11 A Yes, I do.

12 Q And they're just saying they
13 haven't conducted that analysis; correct?

14 A That is correct.

15 Q Then they have language redacted.
16 Do you know what the redaction refers to?

17 A No idea.

18 Q Do you know if it speaks to this
19 question of discrimination against particular
20 unaffiliated networks?

21 A I have no idea.

22 Q Did you ask to find out, from